

Journal of Contemporary Health Law & Policy (1985-2015)

Volume 17 | Issue 1

Article 5

2000

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Harlington Wood Jr.

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Recommended Citation

Harlington Wood Jr., *Leader of the Seventh*, 17 J. Contemp. Health L. & Pol'y xxi (2001).

Available at: <https://scholarship.law.edu/jchlp/vol17/iss1/5>

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LEADER OF THE SEVENTH

*The Honorable Harlington Wood, Jr.**

Late in 1981, one of my colleagues in Chicago on the U.S. Court of Appeals for the Seventh Circuit informed me he had just heard who was being appointed by President Reagan to fill the vacancy on our court. "Who?", I quickly inquired, as I had not. "It's some professor from the University of Chicago named Posner," he responded. In disbelief, matching his, I asked, "Did you say a professor of some sort?" "Yes," he said, "that's the word from Washington." Our conversation continued. "What for?", was my next question, adding before he answered, "The good professor has probably never tried a jury case in his life, so what good will he be to us? He really ought to go work in the real world of law for a while and then maybe come here later." My colleague added he had heard that our new colleague was a law and economics expert. He and I initially shared misgivings about having a professor colleague, but our memories quickly began to influence us. Each of us realized we were greatly indebted to our own law school professors, or we wouldn't be colleagues on the court. Learned Hand in his Holmes lectures at Harvard in 1958 remembering his professors told his audience,

I carried away the impress of a band of devoted scholars;
patient, considerate, courteous and kindly, whom nothing could
daunt and nothing could bribe. The memory of those men has

* Judge Wood, after serving in the Army for four years, graduated from the University of Illinois and entered private practice as a sole practitioner. Later, he was a partner with his father when his father retired from the state bench. President Eisenhower subsequently appointed him United States Attorney for the Central District of Illinois. Later on, he was appointed Executive Head of all United States Attorneys, followed by appointment as Associate Deputy Attorney General, and then Assistant Attorney General in charge of the Civil Division, before being appointed United States District Judge in his home district. He was elevated to the Seventh Circuit in 1979. Judge Wood, while in the Department of Justice, was known for his efforts to avoid bloodshed when the American Indian Movement occupied Wounded Knee, South Dakota in 1973. In all, he had four presidential appointments by three different presidents. He continues to work on a full-time basis, not only on the Seventh Circuit, but by invitation on many of the other circuits.

been with me ever since. Again and again they have helped me when the labor seemed heavy, the task seemed trivial, and the confusion seemed indecipherable.¹

Lawyers don't have to be a Learned Hand to share those sentiments. As we began to consider our new situation more rationally, we decided not to rush to judgment, but to reserve our opinions about our new colleague. Professor Richard A. Posner got confirmed by the Senate, and I first met him when he arrived to be sworn in as the junior member of our eleven-judge court in 1981. In spite of some lingering skepticism, I knew we would have to make the best of it. Judge Posner did, after all, seem like a very pleasant fellow, obviously was very smart, and thankfully even showed a sense of humor. My comments are not going to be a scholarly analysis of Judge Posner's significant cases. I'll leave that to scholars, judges and lawyers who will be reviewing and using them. This, instead, is intended only as an inside personal view of the man and the judge, so let's proceed.

Judge Posner began to exercise his expertise. In a case involving a breach of contract and a preliminary injunction he wrote for the majority making an effort to simplify things for some of the rest of us. He explained his approach as follows:

These mistakes can be compared, and the one likely to be less costly can be selected, with the help of a simple formula: grant the preliminary injunction if but only if $P \times H_p > (1-P) \times H_d$, or, in other words, only if the harm to the plaintiff if the injunction is denied, multiplied by the probability that the denial would be an error (that plaintiff, in other words, will win at trial), exceeds the harm to the defendant if the injunction is granted, multiplied by the probability that granting the injunction would be error.²

The explanation went on, but without help to me. I was pleased to see, however, that another old-fashioned colleague of mine, Luther Swygert, our former chief, now deceased, dissented. He admitted that his dissent might seem harsh, and it was a strong dissent. He concluded that he would have preferred not to try to reduce the "well-developed and complex law of preliminary injunctions to a 'simple' mathematical formula."³ I welcomed Judge Swygert's view, but it was apparent that our old-fashioned approaches to some issues were fast approaching

1. LEARNED HAND, *THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES*, 1958 77 (1958).

2. *American Hosp. Supply Corp. v. Hosp. Prods. Ltd.*, 780 F.2d 589, 593 (7th Cir. 1986).

3. *Id.* at 608.

obsolescence. I went to work, therefore, reviewing my notes and texts from some law and economics institutes I had attended for federal judges, but it was a little late.

Judge Posner and I got better acquainted when we sat on a case involving a barge that had broken loose from its moorings along the Chicago ship canal and caused damage.⁴ How to apportion the damages among those involved was our problem. Judge Posner wrote the opinion for the panel remanding the case to the district court for further proceedings. I fully agreed with the decision, but I had some trouble with the way Judge Posner undertook to explain the apportionment of those damages, so I wrote separately. I noted in my concurrence that Judge Posner had suggested, “that relative fault is in inverse ratio to the costs of accident avoidance to the respective parties.”⁵ Even if I had fully understood that formula, I was dubious about trying to apply it. I conceded, however, that it might be a more efficient approach, but not being an expert in economics as were my two colleagues, I would prefer, to approach comparative fault determination in the old-fashioned way.⁶ Judge Posner lessened the pain for many, however, by concluding his opinion with this aspirin, “the judge and the parties should not feel compelled to conduct a cost-benefit analysis of barge transportation from the ground up.”⁷

Let’s now look at some of Judge Posner’s biographical facts only barely summarized here from his curriculum vitae of thirty-three pages packed with his accomplishments. Those pages are followed by another seventy-seven pages listing his published judicial opinions and dissents, at least 1500 of them and growing daily. A Phi Beta Kappa, he graduated summa cum laude from Yale in 1959, but he made up for his poor showing at Yale by graduating from Harvard Law in 1962, *magna cum laude* (emphasis added). While at Harvard, he was president of the Harvard Law Review. After college he clerked for Justice Brennan, served at the Federal Trade Commission, and then served as an assistant to the Solicitor General of the United States. In 1968 he began teaching at Stanford as an associate professor followed the next year by a full professorship at the University of Chicago. He continues there even now on a part-time basis as a senior lecturer. In the meantime he has written

4. *Rodi Yachts, Inc. v. National Marine, Inc.*, 984 F.2d 880 (7th Cir. 1993).

5. *Id.* at 890.

6. *Id.* My other newly-appointed colleague on this panel was Frank Easterbrook, another distinguished professor from the University of Chicago who became Deputy Solicitor General of the United States.

7. *Id.* at 889.

about thirty books and over 300 articles and book reviews, but he is always current in his court work, more current than some of the rest of us. He is the only person I know who can draft an opinion with one hand and write a new book simultaneously with the other. In addition to a number of awards, he has honorary degrees from Georgetown University and Yale, even from the University of Ghent.⁸

I thought it admirable when, early on in his judicial career, Judge Posner endeavored to make up for any imagined “deficiencies” in his judicial education by bravely volunteering and serving as trial judge in the U.S. District Courts. Some of us waited expectantly for the resulting appeals, and they came. In one concerning a copyright infringement the district court order was “vacated and the case remanded for further proceeding not inconsistent with the opinion.”⁹ One who has helped us in Judge Posner’s real life legal education is former Chief Judge William Bauer, a former U.S. attorney and U.S. district judge in Chicago. Judge Bauer knows his way around not only in a law library, but also in and around the trial courts, state and federal.¹⁰ Judge Posner had trouble as a trial judge in a warranty action for damages. On appeal the only issue was whether he had permitted adequate *voir dire* during jury selection, the type of problem we had anticipated. The jury awarded the plaintiff about \$95,000 in damages, but our court, in an opinion written by Judge Bauer, vacated the jury’s verdict and remanded for a new trial.¹¹ In another of his trial court cases, a defeated candidate for judge of a city court alleged that the defendants, by putting up a candidate with the same name as plaintiff’s causing voter confusion, had conspired to defraud the plaintiff and the local voters of their constitutional rights.¹² Our court affirmed Judge Posner in holding that the civil rights statute governing conspiracy to deprive persons of rights or privileges did not reach non-racial political conspiracies.¹³ This time Judge Posner had a winner. While it now looked like his supplementary practical education might be complete, Judge Posner has continued to help out in district courts, even while serving as

8. You can go beyond this recap if you desire with your own computer, <http://www.law.UChicago.edu/Posner>, but have plenty of paper available.

9. *Deltake, Inc. v. Advanced Sys., Inc.*, 767 F.2d 357, 364 (7th Cir. 1985).

10. See Judge Bauer’s dissent on a subject dear to the hearts of many Chicagoans in *Club Misty, Inc. v. Laski*, 208 F.3d 615, 622-25 (7th Cir. 2000).

11. *Art Press, Ltd. v. Western Printing Machinery Co.*, 791 F.2d 616 (7th Cir. 1986).

12. *Grimes v. Smith*, 776 F.2d 1359, 1360 (7th Cir. 1985).

13. *Id.* at 1366.

our Chief Judge.¹⁴ In a complicated case decided early this year in which I participated, we again gave his trial court work a hard look.¹⁵ Most of it stood the test, but the case was remanded in part for the entry of an amended judgment; only a minor setback in Judge Posner's postgraduate education. It is probably only fair to admit reluctantly that the rest of us who have been trial judges have also had our share of reversals.

Judge Posner's appellate opinions cover the whole legal spectrum, from the significant to the routine. Sometimes his opinions are even interesting to non-lawyers because they tell a story without the color of the story being omitted as irrelevant or being obscured by legal jargon. This year, for instance, he wrote an important opinion affirming the convictions of members of Chicago's "El Rukin" street gang on a variety of federal charges, mainly narcotics violations and murders committed in the course of turf wars with rival gangs, all part of a wide-ranging conspiracy reaching back into the 1960s.¹⁶ In another one, no gang wars, but a widow's benefits were the issue.¹⁷ The plaintiff, Judge Posner observed, had "made a career of marriage. We count seven."¹⁸ Shortly thereafter he wrote one which began, "The plaintiff, Lee, filed two insane complaints charging the United States and China with a conspiracy to 'bio-chemically and bio-technologically infect and invade' various people including Lee with a mind reading mental torture device that Lee calls 'Mind Accessing and Torturing via Remote Energy Transferring (MATRET).'"¹⁹ To counter that problem Lee claimed to have developed a variety of space technologies including an e-mail system and a nanny service to enable victims to relocate on certain safe planets.²⁰ His case was held, not surprisingly, to be frivolous and the appeal was dismissed. Lee may have envisioned himself as some sort of an entrepreneur out on the cutting edge, but the court did not.²¹ A little later Judge Posner was selected to see if as an arbitrator, not a judge, he could somehow work out a settlement between Microsoft and the Government in the Government's

14. Chief Judge Posner completed his term as Chief Judge on August 1, 2000. He was succeeded by Judge Joel Flaum.

15. *Bankcard America, Inc. v. Universal Bancard Sys., Inc.*, 203 F.3d 477 (7th Cir. 2000).

16. *United States v. Boyd*, 208 F.3d 638 (7th Cir. 2000).

17. *Barron v. Apfel*, 209 F.3d 984 (7th Cir. 2000).

18. *Id.* at 985.

19. *Lee v. Clinton*, 209 F.3d 1025, 1025 (7th Cir. 2000).

20. *Id.*

21. *Id.* at 1027. I wonder what was originally thought of Bill Gates as he began to develop new ideas and technologies, but plaintiff Lee was no Bill Gates.

anti-trust suit. This time he was dealing with a genuine entrepreneur, but he could not get it done, so at this writing that conflict continues. In my view Judge Posner was the best possible choice to try to bring that very significant case to a fair and equitable settlement. If he couldn't do it, no one could. By now that case has proceeded I know not where.

I'll mention just a couple of his other cases, one involving a seven-year feud between Plaintiff Hilton and his dog with a neighbor about the dog.²² Judge Posner wrote that Hilton's dog was appropriately named "Rommel," so the problem is evident. Finally, Hilton tired of his own dog and after being arrested for cruelty to Rommel, gave Rommel up for adoption. As Judge Posner remarks, the subsequent history of Rommel may not be strictly germane, but for chuckles he gives us a little of it anyway. Hilton then decided he wanted his dog back. Being unsuccessful he protested at an open hearing of the village council by "dragging [Rommel's] empty leash behind him to punctuate his plea."²³ Also this year, Judge Posner dealt with copyright and procedural issues in a suit against Prince, the well known popular singer, in which Judge Posner showed some knowledge, not just of the law, but of modern music and Egyptian hieroglyphics.²⁴ Reading Judge Posner's opinions can often be welcome relief from the ordinary, but of course only if they do not turn on some mathematical formula not understood by me.

Judge Posner, among other things, is always open, candid, frank, never pompous, and is approachable and responsive. In another opinion he wrote that the problem at hand required the court to "untie a procedural knot partly of our own tying."²⁵ The court took the blame for that problem of its own creation. In another case in which he was presiding and I was sitting next to him, he said something to counsel during oral argument I would never have said. Near the end of counsel's argument Judge Posner leaned forward and advised counsel that his was "the most stupid argument" he had ever heard. Counsel was no more shocked than I was, but I, too, thought it was a totally worthless argument. Judge Posner's candor hopefully may have awakened counsel so that in the future counsel will give more thought to his cases and be a better appellate lawyer because of it. The next time counsel comes back to our court, I hope he will have learned his lesson from Judge Posner and will deserve to win his case. Nor are government agencies spared when they

22. *Hilton v. City of Wheeling*, 209 F.3d 1005 (7th Cir. 2000).

23. *Id.* at 1006.

24. *Pickett v. Prince*, 207 F.3d 402 (7th Cir. 2000).

25. *Jays Foods, L.L.C. v. Chemical & Allied Prods. Workers Union, Local 20, AFL-CIO*, 208 F.3d 610, 612 (7th Cir. 2000).

need some straight talk. In a deportation case, the Board of Immigration Appeals denied asylum to an alien relying entirely on a U.S. State Department "Country Report."²⁶ Judge Posner wrote the opinion reversing the Board's decision. He noted that the Board in asylum cases had not taken to heart previous judicial criticisms of its performance. I expect, however, the Board will the next time. To help persuade the Board, Judge Posner wrote that "[t]he elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the Board in this as in other cases. We are being blunt, but Holmes once remarked the paradox that it often takes a blunt instrument to penetrate a thick hide."²⁷

My admiration that quickly developed for Judge Posner does not mean I always agree with him even though I always enjoy working with him. I'll give you a couple of examples. In a class action brought by professional participants in horse racing in Illinois against the Illinois Racing Board, Judge Posner for a divided en banc court held that a Board rule requiring jockeys and other racing participants to submit to random drug testing did not violate the Fourth Amendment.²⁸ It was so held without the necessity of showing any justification for testing, not even mere suspicion. I thought otherwise and dissented, as I had on the original panel. There was no history in the record whatsoever of drug-related accidents in Illinois among professional horse racing participants. Knowing more about horses than I do about a lot of other things, I enjoyed attacking the majority. Drugs were dangerous to horse racing, I wrote, but those drugs were not the ones which allegedly might be taken by the participants, but were those drugs administered to the thoroughbreds to keep them competing. It seemed to me that jockeys were, without justification, left with fewer constitutional rights than a defendant actually charged with a crime.²⁹ Later at a conference for federal judges at an Eastern university, one of the speakers had some kind words for my dissent, but that was the end of it. In another case, Judge Posner writing for the panel reversed the district court which had held that the Army Corps of Engineers had violated the National Environmental Policy Act of 1969. The Corps because of some construction had granted a barge line a temporary fleeting facility on the Illinois side of the Mississippi River without, in the district court's view, adequately considering the environmental

26. *Galina v. INS*, No. 99-3836, 2000 WL656350 (7th Cir. May 22, 2000).

27. *Id.* at *2.

28. *Dimeo v. Griffin*, 943 F.2d 679 (7th Cir. 1991)(en banc).

29. *Id.* at 686.

consequences.³⁰ The case had to do with only a small bit of the river shoreline in the southwestern Illinois countryside, but it is part of a unique and beautiful scenic area along the Great River Road. The trial judge knew that area well, and so do I, but I'm not sure Judge Posner did, nor would many of my other colleagues. They are after all mostly city folk. Again, I enthusiastically dissented, and along with more substantive arguments not set out here, had some words about the Corps of Engineers:

To the Corps a thing of real beauty and professional enjoyment will be the new lock when it is completed, not the bluffs and river. That can be excused since the Corps, after all, is made up of professional and talented engineers, not artists, nature lovers, catfish fishermen, bikers, hikers, symphony directors, picnickers, joggers, local residents, students, or tourists driving peacefully along the Great River Road.³¹

My sometimes professional disagreements with Judge Posner or any of my other colleagues, do not cause any estrangement, but only seem to increase our collegiability and mutual respect. Long after that case was over, however, I did enjoy hearing the rumor that the Corps of Engineers, even after achieving that favorable decision, had decided to go ahead and do a full environmental impact study before proceeding further. If they did, then I thank them for joining my dissent, even belatedly.

As you might imagine Judge Posner's work has been widely reviewed in the press.³² An interesting interview dated September 26, 1999 was with Linda Greenhouse who reports on the Supreme Court for The New York Times.³³ Her piece was entitled *In His Opinion*, and is about Judge Posner's recent book, *An Affair of State*, analyzing President Clinton's problems. She quotes from the book to illustrate that even the Chief Justice who presided in the Senate over the impeachment procedure did not escape some Posner comment. She mentions that the addition by the Chief Justice of gold academic stripes to his black robe was described by Judge Posner as "ridiculous" and "bizarre."³⁴ Personally, I do not object to academic stripes. Because I can't sing a note, if I could just add an academic stripe or two to my robe, I would no longer look like a member

30. *River Rd. Alliance, Inc. v. Corps of Engineers of United States Army*, 764 F.2d 445 (7th Cir. 1985).

31. *Id.* at 455.

32. See, e.g., Lincoln Caplan, *Is the Supreme Court Ready for this Kind of Free-Market Justice?*, WASH. POST, September 30, 1984, at D1.

33. Linda Greenhouse, *In His Opinion*, N.Y. TIMES, Sept. 26, 1999, at 14.

34. *Id.*

of some church choir. Even if I don't always fully agree with what Judge Posner writes, he is always good reading.

In a quiet place like this court you can see that occasionally we do have a little fun. Our judges have and need a healthy sense of humor. We take our work very seriously, but hopefully not ourselves. We at least endeavor to follow the parting advice of Justice John Paul Stevens, whose seat I now occupy on our court. He cautioned that when we must disagree to "disagree agreeably," but our sometimes expressions of strong contrary views are not intended to be disagreeable, just forceful. One of my couple-of-years-ago law clerks, when his year's term was coming to an end and I was away working on another circuit, undertook to do a video about me as a spoof. He interviewed some of my colleagues on camera. I knew they were great judges, but surprisingly they also showed up to be great actors. My clerk made an appointment to interview by then Chief Judge Posner, but my clerk got off to a bad start with him right away. With his video camera rolling, my clerk opened the interview with, "Judge Posner," but that was as far as he got. Apparently anticipating the use of that recently out-of-date title, Judge Posner quickly stopped my clerk after his two initial words. Then he reached under his chair to bring forth and don a Native American headdress with the admonition that he was, "Chief Judge Posner."

Although it is not very common for courts of appeal to think up and recommend to Congress what the Congress ought to do, for instance, adopt some new procedure, that happened in a case written by Judge Posner.³⁵ The opinion suggested that Congress consider the establishment of a small claims procedure to review fee waiver denials by a government agency under the Freedom of Information Act.³⁶ The fee at issue in the case was under \$40.00, but the case had occupied the time of three of our appellate judges and countless others. There is no reason, separation of powers or otherwise, for a court which sees firsthand a wasteful government situation not to recommend a possible solution to Congress. Congress can ignore the suggestion anyway.

So to close my personal observations I gladly confess my early erroneous misgivings about Judge Posner. He did not need all the trial experience I thought he would. I want to make clear that I came quickly to greatly appreciate and value not only Judge Posner and his judicial contributions, but also the contributions of the other distinguished professors who followed Judge Posner to our court. In addition to Judge

35. *Savage v. CIA*, 826 F.2d 561 (7th Cir. 1987).

36. *Id.* at 563.

Easterbrook, whom I've already mentioned, there is Judge Diane P. Wood with high-level Department of Justice experience and a University of Chicago professorship. Judge Kenneth Ripple, a professor from the University of Notre Dame also joined us. He had served as a Special Assistant to Chief Justice Burger so he had a view from the top. My four professor colleagues have brought a new perspective and scholarly depth to our judicial efforts. Our professor judges joining with those of us who had trial experience both in front of the bench and on it, have helped give our court a rich and balanced blend of scholarship and experience which has raised our court to new heights.

When he was speaking to the delegates at the Constitutional Convention in 1787, Ben Franklin said, "For having lived long, I have experienced many instances of being obliged by better information or fuller consideration to change opinions even on important subjects, which I once thought right, but find to be otherwise." Judge Posner is a truly remarkable man, judge and friend. We have been most fortunate to have had him as a colleague as well as to have had our other professors. I'm now sorry that my original welcome to Judge Posner was not more cordial. It should have been. I still reserve the right, however, if the occasion arises, to disagree even with such a brilliant and valued colleague, particularly if he tries to get around me with some $P \times H_p > (1-P) \times H_d$ solution.